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In the Supreme Court of the United States

No. 77-993

UNION OIL COMPANY OF CALIFORNIA,
a California corporation,
Petitioner,

vs.

ASHLAND OIL COMPANY OF CALIFORNIA,
a California corporation, and
DEPARTMENT OF ENERGY

Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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Petition for Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

Petitioner prays that a writ of certiorari issue to reverse that portion of the judgment of the Temporary Emergency Court of Appeals in *Ashland Oil Company of California v. Union Oil Company of California and Department of Energy,* No. 9-38, which reversed the judgment of the district court.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals has not yet been reported; a copy is attached as Appendix A. Appendix B is a copy of its judgment. The district court wrote no

All emphasis in quotations in this petition has been added, unless otherwise stated.

opinion, but its reasons were expressed from the bench; a transcript of its remarks is attached as Appendix C.

JURISDICTION

The jurisdiction of this Court rests on § 705(c)(2) of the Department of Energy Organization Act (1977), 91 Stat. 607 (42 U.S.C. § 7295 note), which preserves to actions already commenced the provisions of § 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, 87 Stat. 633, as amended, 89 Stat. 948 (15 U.S.C. § 754(a)(1)), which in turn incorporated § 211(g) of the Economic Stabilization Act of 1970, as amended, 85 Stat. 750 (12 U.S.C. § 1904 note). The judgment of the court below was entered December 12, 1977. Its jurisdiction was based upon § 211(b)(2) of the 1970 Act, as amended, 85 Stat. 749, incorporated into the 1973 Act, 87 Stat. 633. The district court had jurisdiction under 28 U.S.C. § 1331(a) and § 211(a) of the 1970 Act, as amended, 85 Stat. 748, as incorporated into the 1973 Act, 87 Stat. 633.

QUESTION PRESENTED

An action was brought to enforce rights created by a federal statute which provides no period of limitations, namely, an action under the Emergency Petroleum Allocation Act of 1973, continued in the Department of Energy Organization Act (1977), to recover for alleged excess of prices charged over government-imposed ceiling prices. The Act permits award of treble damages. Both courts below held that recovery of treble the overcharge was barred by the state one-year statute of limitations applicable to actions upon a statute for a penalty, and the district court construed the same state statute as barring recovery of the "overcharge" and so held. The court below refused to apply the state statute of limitations to the "overcharge" because of its own view of a "national policy" admittedly not found in the text of the statute or its legislative history. Then, to the end of filling

the gap produced by its refusal to apply state law, it split the single cause of action created by Congress into two remedies, one for single and the other for multiple damages, and created its own period of limitations for the second of the two remedies. Did it not thereby err? Is there any basis for departure from law settled by this Court (1) that the availability of different remedies does not constitute different causes of action, and (2) that the state statute of limitations must be applied?

STATUTES INVOLVED

DEPARTMENT OF ENERGY ORGANIZATION ACT, § 705(c)(2) 91 Stat. 607 (42 U.S.C. § 7295):

> "(1) the provisions of this Act shall not affect suits commenced prior to the date this Act takes effect, and,
> "(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted."

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973, § 5(a)(1), 87 Stat. 633, as amended, 89 Stat. 948-9 (15 U.S.C. § 754(a)(1)):

> " *** sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on the date of enactment of this Act) shall apply to the regulation promulgated under section 4(a), to any order under this Act, and to any action taken by the President (or his delegate) under this Act, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; ***"

ECONOMIC STABILIZATION ACT OF 1970, as amended, 85 Stat. 748-750 (12 U.S.C.A. § 1904 note):

> "§ 210. Suits for damages or other relief
> "(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regu-

lation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title."

Sec. 211(a): "The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; ***"

Sec. 211(b)(2): "The Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder."

Sec. 211(g): "Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code."

28 U.S.C. § 1331(a): "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

California Code of Civil Procedure:

§ 312: "Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

§ 335: "The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:"

§ 338: "Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture."

§ 340: "Within one year:

"1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the State, except when the statute imposing it prescribes a different limitation;"

STATEMENT OF THE CASE[1]

Petitioner Union was compelled by the Federal Energy Administration ["FEA"] to sell gasoline to Ashland, not one of its own customers, and to do so at prices at which it sold to customers of its own selection in the same classification (10 C.F.R. §§ 212.31, 212.82, 212.83).

Section 210 of the 1970 Act[2] under which FEA issued its regulations provides that one charged more than the ceiling may sue and recover, and that recovery is to consist of treble the overcharge *or* not less than $100 nor more than $1,000, whichever is the greater—the treble or the dollar amount—*unless* the defendant affirmatively establishes as a defense that the overcharge was not intentional and resulted from a *bona fide* error.

More than a year after the last sale to it by Union, Ashland sued Union in the Northern District of California alleging that Union had charged it prices in excess of the FEA ceilings. Ashland's complaint repeated the same claim in two counts, in one praying for the difference between the alleged ceiling prices and the prices charged, in the other praying for three times the difference, plus, in each instance, attorney's fee. Upon Union's motion, the district court dismissed the action as one "upon a statute for a penalty or forfeiture" barred by the California one-year statute of limitations (quoted, p. 5 above).

On appeal, the Temporary Emergency Court of Appeals affirmed in part and reversed in part. It held that the California one-year statute did bar Ashland's prayer for treble the difference between the prices charged and the alleged ceiling but that the prayer for the difference was not barred.

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1. The case having been dismissed on the complaint, a copy of which is attached as Appendix D, we take the facts from its allegations.

2. Quoted, pp. 3-4 above.

REASONS FOR GRANTING THE WRIT

The court below has legislated, and it has justified its doing so by combining two courses of reasoning, each of which is in conflict with settled applicable decisions of this Court. Because all appeals under the federal statute here involved are channeled to the Temporary Emergency Court of Appeals, no conflict between circuits is possible, a factor peculiarly calling for certiorari under *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 50 (a case singled out for attention in the Court's Rule 58(2)).

The starting point of the case is the fundamental rule that, in any suit on a cause of action created by federal statute, the statute of limitations of the state where the action is brought controls if, as here, Congress has not itself prescribed the period of limitations.[3] This case is one of a series coming to the Court in recent years where lower courts have disregarded, or litigants have sought to have them disregard, that settled rule, in order to apply some different period of limitations or no period at all, according to the court's notion of what it would have enacted had it been Congress, doing so on the basis of an imagined "national public policy" neither stated in the statute nor found in the legislative history.

The evil of the treatment given this case by the court below reaches far beyond an improper decision under a particular statute. The law is a "seamless web", and the evil consists of doing violence to principles pervading the whole fabric of jurisprudence

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3. For example, *Campbell v. Haverhill*, 155 U.S. 610 (1895) (Patent Act); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906) (Sherman Act prior to the passage of 15 U.S.C. § 15b in 1955); *O'Sullivan v. Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1871); *Rawlings v. Ray*, 312 U.S. 96 (1941) (National Bank Act); *Auto Workers v. Hoosier Corp.*, 383 U.S. 696 (1966) (Section 301 of the National Labor Relations Act); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975) (Civil Rights Act of 1870); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n. (1976) (Securities Exchange Act of 1934); *Runyon v. McCrary*, 427 U.S. 160 (1976) (Civil Rights Act of 1866).

and thus creating precedent to disjoint the law in innumerable other situations.

The district court and the court below concurred in holding that an action for treble damages is an action for a penalty and therefore subject to California's one-year period. The district judge, learned in California law,[4] also held that where a statute allows treble damages, even though it does not mandate them, it too is a statute for a penalty within the meaning of the California statute of limitations, and that any claim for unmultiplied damages created by the same statute is as much barred, under California law, as a claim for multiple damages.

The court below did not place its decision upon any disagreement with that understanding of California law. Instead, in a remarkably candid opinion, it took two other courses of reasoning, neither sufficient by itself to sustain its conclusion and neither valid.[5] It held that the applicable state statute may be ignored if, in the court's opinion, it would frustrate some "overriding national policy". It epitomized this course of reasoning thus (App., pp. 7-8):

> "[i]n determining whether a state statute of limitations will be applied to a federal right, courts must be guided by public policy expressed by Congress. Thus, there need not be applied a state limitation period which the court finds to be inconsistent with the federal policy involved."

4. The interpretation of state law by a federal judge sitting in that state, especially where the judge is a member of the bar of the state, as here, is given great weight. *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 204 (1956); *Gooding v. Wilson*, 405 U.S. 518, 524 (1972).

5. While determination of what a federal statute provides is for the federal courts, determination of what state statute of limitations applies to statutory claims of the kind thus determined to have been created by the federal statute is a matter of state law. *Leh v. General Petroleum Corp.*, 330 F.2d 288 (9 Cir. 1964), reversed on other grounds, 382 U.S. 54. If the court below had been either able or willing to say that the district court erred in holding that under California law the one-year statute applies to any claim created by a statute permitting treble damages, it could have disposed of this case on that basis without embarking on its two-pronged course of reasoning.

While the court cited *Occidental Life Insurance Co. v. Equal Employment Opportunity Commission*, ... U.S. ....., 97 S.Ct. 2447 (1977), as support for this proposition, it acknowledged that *Occidental* and this case are quite different. In holding that no statute of limitations bars a suit brought by the Equal Employment Opportunity Commission, this Court had carefully explained that its decision turned upon the fact that Title VII of the Civil Rights Act of 1964 placed duties and obligations on the Commission and envisaged procedures by it inconsistent with any statute of limitations at all and that the history of the Act demonstrated that Congress did not intend state statutes of limitations to apply. Again candidly, the court below acknowledged that neither the pertinent Act in the present case nor its history contained anything comparable, for it said (App., pp. 8-9):

> "But dissimilarly, EPPA contains no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law, nor does our case directly involve enforcement of a public right by governmental action as did *Occidental Life*. There is no suggestion whatever in the statutory structure undergirding the claims before us that Congress intended no limitation provisions to apply or that state statutes of limitations should not be looked to in accordance with the general rule in the absence of express federal provision. Nor can anything be discerned to indicate that the relatively brief but not unusual period of limitation found in state law should not be applied to any claims in the nature of penalties."

Nevertheless, the court proceeded upon an assumption of a supposed "overriding national policy", without ever identifying it beyond the court's feeling that one year is too short a time for an action seeking non-multiple damages. But an "Act is the vehicle by which its purposes are expressed and carried out", *United Air Lines, Inc. v. McMann*, ... U.S. ....., 46 U.S.L.W. 4043, 4045 (Dec. 12, 1977). And a conclusion that a one-year statute of limitations would frustrate national policy is readily

shown to be fallacious. Section 210 of the Economic Stabilization Act, here involved, was modeled on the Defense Production Act of 1950 (64 Stat. 811, Ch. 932, § 409(c)), the price control act of the Korean conflict, which in turn was modeled on the price control act of World War II (Emergency Price Control Act of 1942 (56 Stat. 34, as amended, 58 Stat. 640)). In those acts Congress expressly required suit to be brought within one year "from the date of the occurrence of the violation". Thus Congress plainly showed that it did not regard a one-year period as frustrating public policy of an act setting price ceilings. And in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), brought under 42 U.S.C. § 1981 for employment discrimination, this Court held that a state one-year statute barred the action. Yet a policy so fundamental as prohibiting racial discrimination is either more vital or at least as vital as a price control policy. This Court specifically commented in *Johnson* (pp. 463-464):

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. * * * In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit * * * on the prosecution of a closely analogous claim."

The court below held that national policy is not frustrated by a three-year bar. At what point does a frustration occur? At 2, or only at 1? These are legislative questions, not judicial. As said by this Court in *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 702-703 (1966),

> "Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, *there is no justification for the drastic sort of judicial legislation that is urged upon us.*"

And (at 701) it characterized a rejection of state law as so "bald a form of judicial innovation" and said (p. 704):

> "Against this background [of settled decision since *Campbell v. Haverhill*], we cannot take the omission in the present statute as a license to judicially devise a uniform time limitation for § 301 suits."

What is a reasonable period of limitations is a value judgment, and when Congress states no period of limitation itself, it accepts the value judgment of the state, not of the courts, and declares the national public policy to be that the state statute controls. So this Court held in the *Johnson* case.

No doubt there is a national public policy about price controls, stated in the statute and the regulations. But, as this Court said in *Johnson v. Railway Express Agency, supra*, there is no public policy about the period of limitations. It there said (p. 467, fn. 13):

> "We note expressly how little is at stake here. We are not really concerned with the broad question whether these respondents can be compelled to conform their practices to the nationally mandated policy of equal employment opportunity. . . . The question in this case is only whether this particular petitioner has waited so long that he has forfeited his right to assert his § 1981 claim in federal court."

The result of the court's invoking "public policy" validates the oft quoted statement[6] of Lord Burrough in *Richardson v. Mellish*, 2 Bing. 229, 252, 130 E.R. 294, 303, that:

> ". . . public policy . . . is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail."

Having rejected California's one-year period on "policy" reasons, having mounted that "unruly horse", and realizing that

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6. Quoted, for example, in *Dixie Machine Welding & Metal Works v. United States*, 315 F.2d 439, 441 (5 Cir. 1963).

something more solid was needed than to pick a different time period out of the air, the court below embarked on its second course of reasoning, which led it away from "sound law". It proceeded *as if* the federal statute on which the action is based creates two separate causes of action, because, so it said, Ashland's alternative prayers for relief involved "essentially different combination of elements", giving rise to two "rights of action". This is how it characterized the provision of the statute that treble damages are defeated if the defendant affirmatively establishes that the overcharge was not intentional or was the result of *bona fide* error, but single damages are not. The court then analogized the *remedy* of "single damages" to a *cause of action* on a non-penal statute, to which California applies a three-year period. Its opinion does not claim that it follows California law; it asserts only that it is "not inconsistent with California law" (App., pp. 12, 13). It had no choice but to refrain from asserting that it was applying California law because, while it is *possible* for the legislative authority to direct different periods of limitation at different *remedies* or types of *relief*, California has not done that. California's limitations are always applied to the "*cause of action*" (Cal. Code Civ. Proc. § 312, quoted at p. 5 above), never to *remedies* or *relief* (see p. 15n below).

It is here that the court has run counter to a most basic and pervasive principle. *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316 (1927), settled that there is only one cause of action where a single primary right has been violated. There, in a first suit, one who had suffered personal injuries sought recovery on a claim that appliances were defective. In a later suit, he claimed that his injury was caused by negligent operation of the appliances. This Court held the second suit barred by the judgment in the first because there was "a single wrongful invasion of a single primary right of bodily safety, whether the acts constituting such invasion were one or many, simple or complex." *Baltimore S.S.*

Co. v. Phillips has been repeatedly cited by this and other courts in a variety of contexts. For example, it has repeatedly been the basis of holdings of *res judicata*. *E.g., Williamson v. Columbia Gas & Electric Corp.*, 186 F.2d 464, 467-68 (3 Cir. 1950), *cert. denied* 341 U.S. 921 (1951); *F. L. Mendez & Co. v. General Motors Corporation*, 161 F.2d 695 (7 Cir. 1947), *cert. denied*, 332 U.S. 810.[7]

This same principle is the basis of decisions which expand federal jurisdiction in one direction and contract it in another. Starting with *Hurn v. Oursler*, 289 U.S. 238 (1933), and burgeoning in *Mine Workers v. Gibbs*, 383 U.S. 715 (1966), it is the foundation of "pendent jurisdiction". The same principle has imposed a wide limitation on removability of suits from state to federal courts, *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("The single wrong for which relief is sought is the failure to pay compensation for the loss on the property.").

In the present case, right of any recovery, single or treble, exists only by virtue of § 210 of the Act, which, as we have seen (pp. 3-4 above) provides that one charged more than the ceiling price may sue and recover. The primary right is the right not to be "overcharged". The single damages and the treble damages, the arbitrary $100.00 to $1,000.00, the award of attorney's fees, constitute different remedies; they do not constitute different causes of action. A plaintiff's prayer "forms no part of the cause of action." *Unanue v. Caribbean Canneries, Inc.*, 323 F.Supp 63, 67 (D. Del. 1971).

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7. In *F. L. Mendez* plaintiff claimed wrongful cancellation of a contract right to purchase automobiles; in the first suit, the wrong was said to be a violation of the Clayton Act; in the second, participation in a conspiracy in violation of the Sherman Act. The court said: "It [plaintiff] has one right and one only; the right to enjoy its contract. It complains of one wrongful act, namely, deprivation of that right . . . The gist of its action is its injury arising from alleged wrongful deprivation of its contract right." (P. 698).

The very essence of *Baltimore S.S. Co. v. Phillips, supra,* and the innumerable decisions proceeding on the primary right concept show that the distinction made by the court below about "different combination of elements" is wholly untenable. This Court taught in *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221, 224-225 (1958), a statute of limitations case, that where there is a single wrongful invasion of a single primary right, there is only one cause of action even though the plaintiff may have differing "means of recovery" which are "varied in their elements of proof, type of defenses, and extent of recovery." And as the Court held in *Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430, 443-444 (1943), a single injury does not "give rise to two causes of action merely because recovery" is permitted under different statutes each affording "a different measure of recovery." Or, as observed in *McMahon v. United States,* 186 F.2d 227, 230 (3 Cir. 1950), where plaintiff was held barred by limitations even though his "right of action" had not been perfected by procedural steps, there is ". . . a distinction between a cause of action and the right of action thereon . . . . A cause of action is a legal wrong, the thing which becomes a ground for suit."

As the district court correctly observed (App., p. 17), a plaintiff under the Act involved in this case has no choice about whether to seek multiple damages or single. His suit is for what the Act allows. The decision of the Emergency Court of Appeals allows a plaintiff, barred from the remedy of multiple damages, to absolve defendant from the burden of establishing its defense of non-intentional overcharge or *bona fides,* thereby permitting the plaintiff to create a different cause of action from what Congress created. A plaintiff should not be able to restructure the cause of action, saying "I waive the trebling and ask only for single damages," and thereby escape the bar of limitation.

The "primary right" understanding of a cause of action is not only basic in decisions of this Court, it is settled California law.

Wulfjen v. Dolton, 24 Cal. 2d 891, 151 P.2d 846 (1944), where the California Supreme Court said ((pp. 895-896):

> "The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other."[8] [Emphasis in original]

The very purpose of creation by § 210 of the Economic Stabilization Act of a private cause of action was penal. That act originated in 1970 as a criminal statute, providing the "penalty" of a fine in § 204 (84 Stat. 800), carried forward into § 208 by the 1971 amendments (85 Stat. 747), and today appearing in 89 Stat. 949 (15 U.S.C. § 754(a)(3)). As remarked by the court below in *Longview Refining Company v. Shore,* 554 F.2d 1006, 1012 (T.E.C.A. 1977), "there can be no doubt that section 208(a) is essentially criminal in nature." Both the Senate Report and the House Report on the statute adding § 210 in 1971 (85 Stat. 743, 748), quoted in footnote 11 of the court's opinion (App., p. 9), emphasize that the purpose was to assist the enforcement of the criminal statute by ferreting out violators and deterring would-be violators. Deterrence is one of the traditional aims of punishment. Other panels of the court below have extended this observation to § 210(b), characterizing it as penal, designed to punish acts essentially criminal in nature, *e.g., DeRieux v. Five Smiths, Inc.,* 499 F.2d 1321, 1338 (T.E.C.A. 1974), *cert. denied,* 419 U.S. 896:

> "Thus, the damages available under § 210(b) are punitive in nature * * *
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> * * *

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8. This principle is applied in California, not only for *res judicata, Ford Motor Co. v. Superior Court,* 35 Cal.App.3d 676, 679, 110 Cal. Rptr. 59, 61 (1973) but for purposes of the statute of limitation: "[T]he statute of limitations to be applied is determined by the nature of the right sued upon, not by the . . . relief demanded." *Day v. Greene,* 59 Cal.2d 404, 411, 29 Cal.Rptr. 785 (1963).

"Even though such an award is discretionary with the district court, its prospect above might have caused the Falcons to order their conduct differently so as to avoid the risk. * * *

"This conclusion is fortified by the deterrent purpose of § 210, above referred to."

In support of its statement that its conclusion is "not inconsistent with California law" (App., pp. 12-13), the court below cites cases concerning statutes of limitation which do not support it (App., p. 13). All but one are of situations where a cause of action for single damages already existed at common law, independent of the penalty created by statute.[9] Barring the penalty of multiple damages created by statute did not bar the pre-existing common law cause of action. But here there was no such thing as an "overcharge" except as created, not only by the Act, but by the very same sentence of the very same section of the Act as created the right to recover multiple damages. The court's opinion therefore falls back on an analogy to a supposed indication in *Stone v. James,* 142 Cal.App.2d 738, 299 P.2d 305 (1956), not a case of multiple and single damages. There, one section of a statute provided that a conditional purchaser on installments could pay off the whole debt at any time and should then have a refund of prepaid but unearned interest; an entirely different section of the Act provided for forfeiture of the principal. Concerning an argument that there was a right to recover unearned interest even where the right to forfeit the principal was barred, the court remarked that "appellant may well be right" but dismissed the argument as irrelevant because the claim was barred anyway. The court's comment about "may well be

9. For example, for injury to one's realty a common law action for trespass always existed; California statute created a new cause of action where the injury consisted of cutting down trees. *United States v. Magnolia Motor & Logging Co.,* 208 F.Supp. 63 (N.D.Cal. 1962).

right" was thus not even dictum; it was mere rumination. The court below errs in suggesting that there is no contrary ruling by the California Supreme Court. The rumination in *Stone v. James* gives way to the later decisions of *Ford Motor Co. v. Superior Court,* 35 Cal.App.3d 676, 110 Cal.Rptr. 59 (1973) and *Day v. Greene,* 59 Cal.2d 404, 29 Cal.Rptr. 785 (1963), both cited in fn. 8, *supra,* and it is inconsistent with this Court's decision in *McAllister v. Magnolia Petroleum Co.,* 357 U.S. 221 (1958), discussed at p. 14 above.

The regulations of the FEA, now the Department of Energy, denying one the right to select its own customers and fixing prices, are harsh. So long as they are within the authority granted by Congress, doubtless the harshness may be said to represent "national public policy". But the defense of limitations is "favored in the law" (*Wood v. Carpenter,* 101 U.S. 135, 139), and the harsh impact of the regulation should not be augmented by the personal view of judges fortuitously empaneled to hear a particular cause of what period of limitations is desirable.

CONCLUSION

We respectfully submit that the petition should be granted.

Dated: January 11, 1978.

MOSES LASKY

Moses Lasky
Attorney for petitioner

(Appendices follow)

Appendix A

Temporary Emergency Court of Appeals
of the United States

No. 9-38

Ashland Oil Company of California
Plaintiff-Appellant,
v.
Union Oil Company of California; and
Department of Energy,
Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of California

(No. 77-0607-CBR)

(Argued October 28, 1977 Decided December 12, 1977)

ALFRED LAWRENCE TOOMBS, Batzell, Nunn & Bode, Washington, D.C., with whom William H. Bode of the same firm; and Robert L. Dunn, Bancroft, Avery & McAlister, San Francisco, California, were on the brief for the Plaintiff-Appellant.

MOSES LASKY, Brobeck, Phleger & Harrison, San Francisco, California, with whom John E. Munter and Forrest A. Hainline, III, of the same firm, were on the brief for the Defendants-Appellees (Union Oil Company of California).

ROBERT E. RICHARDSON, Department of Justice, Washington, D.C., with whom Barbara Allen Babcock, Assistant Attorney General and Gerald D. Freed, were on the brief for the Defendants-Appellees (Department of Energy).

Before CARTER, CHRISTENSEN and JAMESON, Judges.

CHRISTENSEN, Judge:

The question presented in this case involves the period of limitations to be applied to an action for overcharges on sales of petroleum products.

On March 23, 1977, plaintiff-appellant, Ashland Oil Company of California ("Ashland"), filed suit in the United States District Court for the Northern District of California against Union Oil Company of California ("Union") and the Federal Energy Administration ("FEA")[1] alleging that Union charged prices for petroleum products sold to Ashland during the period of January 1975 to February 1976 in excess of those permitted by FEA's Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212.[2] Ashland's action is based on Section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), 15 U.S.C. § 754 (a)(1), which incorporates § 210 of the Economic Stabilization Act, 12 U.S.C. § 1904 note.[3] Our appellate jurisdiction as to such

1. Initially and for the purposes of this appeal FEA was named as a party in response to the admonition of Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977) and prior decisions of this court with respect to § 210 actions. While this case was pending on appeal the Department of Energy (DOE) was substituted for the FEA pursuant to Public Law 95-91 (August 4, 1977) and Executive Order 12009 42 F.R. 46267 (Sept. 13, 1977), which created the Department of Energy as of October 1, 1977. Pursuant to the Act the duties, functions and responsibilities of FEA have been assumed by DOE.

2. Basically, these FEA regulations prohibit a refiner from charging to any class of purchaser a price for petroleum products in excess of the weighted average price at which such products were lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus certain increased costs.

3. Section 210 provides:

Section 210. *Suits for damages or other relief.*

(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States. . . .

(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: Provided, that where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within ninety days from the date of the presentation of such claim.

actions rests in view of 15 U.S.C. § 754(a)(1), *supra*, upon § 211(b)(2) of ESA, as amended.

Union is a refiner of motor gasoline and other petroleum products. Ashland alleges that it belonged to the class of purchaser composed of non-branded independent marketers which are independent wholesale purchaser-resellers, and that Union placed Ashland into a different class of purchaser and thereby charged it prices up to and including February, 1976, at least 5.5 cents higher than those charged to other members of the purchaser class to which Ashland actually belonged. The complaint is divided into two claims or "causes of action", the first for the recovery of actual overcharges, the second for treble damages on the theory of "intentional" overpricing, with attorney's fees sought on each claim. On August 16, 1976, Ashland filed with Union a statutory claim for refund pursuant to the last sentence of § 210(b). The ninety day waiting period elapsed without a refund from Union. Ashland commenced this action on March 23, 1977, more than a year after its claims accrued.[4]

4. Ashland contended in the district court that its claims did not accrue until its actual discovery of the overcharges, a position properly rejected below and not pressed here apart from the issue of fraudulent concealment. The latter issue was only tangentially discussed by the trial court: "And I think on the basis of your president's affidavit it's clear that they were aware of the . . . overcharge and its extent prior to the bar of the statute of limitations, and the fact that they didn't file is . . . just one of those unfortunate things that happens all the time." The point was missed by the trial court that fraudulent concealment could extend a period of limitations beyond its normal termination even though that time had not

FEA filed an answer denying knowledge or information sufficient to form a belief as to the truth of Ashland's critical allegations of fact and Union filed a motion to dismiss for failure of the complaint to state a claim on which relief could be granted, F.R.Civ.P. 12 (b)(6).[5] Union's motion was based on the contention that Ashland's action for both actual overcharges and treble damages was barred as a matter of law by the California statute of limitations, section 340(1), California Code of Civil Procedure. That statute prescribes a one year statute of limitations for "[a]n action upon a statute for a penalty or forfeiture."[6] Union's motion was granted by the trial court on June 23, 1977, and on June 24, 1977, final judgment was entered dismissing Ashland's action in its entirety with prejudice, costs to Union.[7]

fully expired before the concealment was discovered. See Bailey v. Glover, 88 U.S. (21 Wall.) 342, 348 (1874). This point becomes immaterial in view of our ruling hereafter that there was no fraudulent concealment.

The contention suggested by Ashland to the trial court that its claim for reimbursement for overcharges did not accrue until the expiration of the 90 day notice required by § 210, *supra,* has been abandoned on this appeal.

5. In connection with Ashland's argument that it had not discovered the overcharges until more than a year after they were made, it filed and the court considered the affidavit of its president, thus invoking Rule 56 by virtue of the last sentence of Rule 12(b).

6. Section 338(1), Cal.C.C.P., provides a three year statute of limitations for "[a]n action upon a liability created by statute, other than a penalty or forfeiture."

7. The judgment was entered without written opinion. However, the court's principal reasoning is evident in the following excerpts from the transcript of its oral decision:

> "The Court: . . . where there is a private action provided for in the federal statute, and there is no statute of limitations, that I think you then have to go to the applicable state statute of limitations, and I think it's very clear in the State of California, it's 340.1.
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> . . . .
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> ". . . You see, the thing is, I really don't believe that—that it was contemplated, or that a court would hold that you have on year within which to file after the claim arises, if you're seeking trebling, and you have three or four or five or some other period to file, if you're seeking single damages. I just don't think so. I think you've got one claim here, and that one claim, depending upon the circumstances, may entitle you to the trebling of the amount of the overcharge.
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> . . . .
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> ". . . But to me it's clear there's only one statute of limitations for the claim, even though the possibility of trebling exists and I think under Leh [Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964), *rev'd on other grounds,* 382 U.S. 54 (1964)], I look to the state statutes, and regardless of Holland [Holland v. Nelson, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (1970)], it seems to me that this is in effect, where the possibility of trebling occurs, is in the nature of a penal statute, and that the one-year statute of limitations under 340.1 is applicable."

Ashland filed a timely notice of appeal to this court on July 22, 1977.

It is contended in support of this appeal that the district court erred in dismissing the entire action because California's three year statute of limitations should be held to govern at least the claim for the recovery of actual overcharges as "[a]n action upon a liability created by statute, other than a penalty of forfeiure," Cal.C.C.P. 338(1). In the alternative, Ashland would have this court apply California's three year statute of limitations to both counts of its complaint. Finally, Ashland argues that the doctrine of fraudulent concealment sustains both counts of the complaint, since Union allegedly "concealed" the existence of the improper classification until within a year of the filing of its complaint. We first address the latter point.

I

Even though California's statute of limitations applies in this case, any issue relating to accrual and tolling is governed by federal law. Cope v. Anderson, 331 U.S. 461, 464 (1946); Rawlings v. Ray, 312 U.S. 96, 98 (1940). Where acts causing injury are fraudulently concealed from the injured party or where fraud furnishing the basis of an action is of such nature as to conceal itself, a statute of limitations is tolled until the injured party

discovers, or with due diligence could have discovered, the injury. Holmberg v. Armbrecht, 327 U.S. 392 (1945); Bailey v. Glover, 88 U.S. (21 Wall.) 342 (1875), *supra*; American Pipe & Construction Co. v. Utah, 414 U.S. 538. It is clear, however, that mere ignorance on the part of a plaintiff is not sufficient. Wood v. Carpenter, 101 U.S. 135, 143 (1879).

In support of its claim of fraudulent concealment Ashland argues that by their very nature, violations of the type alleged herein are not self-revealing and that it had insufficient knowledge of the foundations of a claim to start the statute running.[8]

Appellant has misconceived the governing law. To support the result contended for plaintiff would have to establish either that the defendant fraudulently concealed the conduct forming the basis of the claim or that the defendant's conduct by reason of its fraudulent nature was inherently self-concealing. The fact that FEA pricing regulations involve complicated accounting processes and that price information resulting from those processes is not "self-revealing" is not enough to sustain a claim of fraudulent concealment, nor is any mere failure on Union's part to publish price information that it was not required otherwise to publish.

We do not determinatively fault Ashland's position merely because of its failure to plead with particularity the circumstances constituting the claimed fraudulent concealment, or even to mention such a claim in its complaint.[9] The trial court considered

8. Ashland asserts that in order to determine if Union was in compliance with the FEA pricing regulations Ashland must have discovered: (1) the names of each other member of the relevant class of purchaser; (2) the May 15, 1973, price charged to each such applicable purchaser; (3) the volume of each such purchaser on May 15, 1973; and (4) Union's cumulative increased costs for the period in question. This information it is said is not published anywhere, and in fact is considered confidential by the FEA, and hence the running of the statute should be deemed tolled until the time Ashland actually discovered the alleged overcharges.

9. But see F.R.Civ.P. 9(b). See also Dayco Corp. v. Goodyear Tire & Rubber Co., 523 F.2d 389 (6th Cir. 1975); Weinberger v. Retail Credit Co., 498 F.2d 552 (4th Cir. 1974); Akron Presform Mold Co. v. McNeil Corp., 496 F.2d 230 (6th Cir.), *cert. denied*, 419 U.S. 997 (1974).

as on summary judgment as we heretofore observed the affidavit of Ashland's president in resistance to the motion to dismiss, and any defective pleading could be deemed supplemented for the purposes of our present inquiry by the substance of this collateral showing. Ashland's trouble on the point is that the affidavit not only failed to support Ashland's position on the issue of fraudulent concealment but tended affirmatively to further demonstrate its lack of merit.[10] No tolling having occurred in view of the uncontroverted facts of record, we proceed to consider the period or periods of limitation applicable to plaintiff's complaint.

II

Neither the EPAA nor § 210 of the ESA contains a limitation provision. Generally in the absence of a statutory limitation provided by Congress, a federal court will apply the most analogous state law of limitations. *E.g.*, Runyon v. McCrary, 427 U.S. 160, 179-80 (1976) (Civil Rights Act of 1866); Auto Workers v. Hoosier Corp., 383 U.S. 696, 701-05 (1966) (Labor Management Relations Act); O'Sullivan v. Felix, 233 U.S. 318, 322-23 (1914) (Civil Rights Act of 1871); Chattanooga Foundry & Pipeworks v. Atlanta, 203 U.S. 390, 397 (1906) (Sherman Act); Campbell v. Haverhill, 155 U.S. 610, 614-16 (1895) (Patent Act). However, in determining whether a state statute of limita-

10. The affidavit of Ashland's president, Walter J. Simas, submitted in opposition to Union's motion to dismiss, states that in June, 1976, Ashland employed special counsel to investigate the pricing practices of all its major suppliers. Approximately one month later, in July, 1976, Ashland was advised that Union had placed Ashland in an improper class of purchaser and had thereby overcharged Ashland for petroleum products. Such allegations do not document a claim of due diligence, and indeed these facts appear contrary to any theory of due diligence for, within a month after special counsel began its investigation, the existence of the alleged overcharges was discovered. See Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U.S. 821 (1961).

tions will be applied to a federal right, courts must be guided by the public policy expressed by Congress. Thus, there need not be applied a state limitation period which the court finds to be inconsistent with the federal policy involved.

The Supreme Court recently stated in Occidental Life Insurance Co. v. EEOC, 97 S.Ct. 2447, 2455 (1977), in refusing to limit the rights of the government by a state statute of limitations:

> But the Court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state laws will not frustrate or interfere with the implementation of national policies. "Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide." *Johnson v. Railway Express Agency,* 421 U.S. 454, 465 [(1974)]. State limitations periods will not be borrowed if their application would be inconsistent with the underlying policies of the federal statute.

As with the equal employment opportunity statute with which *Occidental Life* was concerned there is strong national policy expressed in the EPAA. But dissimilarly, EPAA contains no indication that expressed national policy is inconsistent with any fixed period of limitation borrowed from state law, nor does our case directly involve enforcement of a public right by governmental action as did *Occidental Life.* There is no suggestion whatever in the statutory structure undergirding the claims before us that Congress intended no limitation provisions to apply or that state statues of limiations should not be looked to in accordance with the general rule in the absence of express federal provision. Nor can anything be discerned to indicate that the relatively

brief but not unusual period of limitation found in state law should not be applied to any claims in the nature of penalties.

The national policy otherwise expressed in § 210 and its legislative history yet is instructive, for it tends to repel the extreme view taken by each of the parties—Ashland's that California's three-year limitations period and Union's that its one-year period should be applied indiscriminately to both claims of the complaint. While there is public policy clearly evident to provide both remedy for and deterrence against the violation of pricing regulations,[11] the Congress made it equally clear that the recovery of treble damages in the nature of a penalty for violating those regulations would involve more stringent proof of additional elements than that warranting the award of merely compensatory relief.[12]

We have concluded that the national policy can best be harmonized with the state statute of limitations by applying the one

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11. The absence of congressional debate on whether to add § 210 of ESA to EPAA underscores the importance which was attached to the addition of the private remedies provided by the former. The lack of extensive government machinery to police the price regulations coupled with their emergency nature and complexity made the role of private actions critical. The House Report with reference to § 210 stated:

> The Committee, in line with the Administration's emphatic request for voluntary surveillance to assure compliance with price and rent regulations and orders, adopted this section so that it would serve not only to provide a means to recover losses, but would provide a strong deterrent to those who would willfully violate this Act.

H.R. Rep. No. 92-714, 92nd Cong., 1st Sess. (1971). From the Senate Report:

> Section 210 provides a traditional method by which violators of regulations may be discovered and other would-be violators may be deterred. This can be accomplished by authorizing a person suffering a legal wrong to bring a treble damage action against a violator.

Senate Rep. No. 92-507, 92nd Cong., 1st Sess. (1971).

12. Section 210 draws clear distinction between remedial recovery of overcharges and treble damages for intentional violations in the nature of a penalty beyond compensation; and for each claim there is specified a prerequisite not applicable to the other. See Manning v. Univ. of Notre Dame Du Lac, 484 F.2d 501 (TECA 1973).

year bar to Ashland's second claim, and allowing maintenance of the first claim as an action other than for a penalty. Any other result, we believe, would be inconsistent with the most persuasive local interpretation of the California statute of limitations. We further are of the opinion that overriding national policy would require us to comport any variance or uncertainty in the California rule to the indicated result.[13] In ascertaining what state statute of limitations should be applied to federally created claims, a federal court will accept the state court interpretations of the state's limitations statute, but the nature of the claims presented will be determined by federal law. Moviecolor, Ltd. v. Eastman Kodak Co., 288 F.2d 80, 83 (2d Cir.), *cert. denied,* 368 U.S. 821 (1961), *supra*; Bertha Building Corp. v. National Theatres Corporation, 269 F.2d 785, 788 (2d Cir. 1959); see also, Auto Workers v. Hoosier Corp., 383 U.S. 696, 706 (1966), *supra.*

The California Code of Civil Procedure specifies two limitation periods the applicability of which must be considered in the light of national policy and particularly in view of the provisions of § 210 of ESA. Section 338 (1) provides a three year limitation for "[a]n action upon a liability created by statute, other than for a penalty or forfeiture" and § 340(1) mandates a one year limitation for "[a]n action upon a statute for a penalty or forfeiture." Section 210 expressly provides for both compensatory damages and exemplary damages, drawing a clear distinction, as

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13. See Auto Workers v. Hoosier Corp., 383 U.S. 696, 705-06 (1966), *supra*:

> The Union argues that if the timeliness of this action is to be determined by reference to Indiana statutes, federal law precludes reference to the Indiana six-year provision governing contracts in writing.
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> . . . .
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> We agree that the characterization of this action for the purpose of selecting the appropriate state limitations provision is ultimately a question of federal law. But there is no reason to reject the characterization that state law would impose unless the characterization is unreasonable or otherwise inconsistent with national labor policy.

we have noted.[14] TECA has considered in different context the distinction between an action for actual damages and one for treble damages[15] in three prior cases[16] but has not yet found it necessary to consider the distinction, if any, between the terms "intentional" and "wilful" as employed in different parts of § 210. Nor do we consider it essential to do so now. Whether for wilful or intentional overcharging, or both, the award of treble damages pursuant to § 210 would be in the nature of a penalty within the contemplation of California law.

The California courts have held actions for damages beyond or without reference to actual loss to be actions for a "penalty

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14. The gist has been fairly summarized:

> Compensatory relief, i.e., refund of the amount of overcharge, is available in all cases of overcharge provided that, except in the case of willful overcharges, the purchaser requested and did not receive a refund from the overcharging seller within 90 days of such request. Exemplary damages, i.e., the greater of treble damages or $100 to $1,000, are available at the discretion of the court in cases where the overcharge was intentional and not the result of bona fide error. These are two different rights of action distinguishable as to the elements that must be proved in order to be granted relief. (FEA Br. p. 9.)

15. Union contends that § 210 provides two remedies, but only one "cause of action." However, this argument disregards the essentially different combination of elements required for claims as they were separately stated in conformity with Rule 8(e)(2), F.R.Civ.P. Union further asserts that the entire section is a penal statute inasmuch as ESA was originally enacted as a criminal statute and the amendments allowing civil recovery were designed to assist the enforcement of the criminal provision by deterring and punishing violators of the price regulations. We reject this reasoning.

16. Longview Refining Co. v. Shore, 554 F.2d 1006 (TECA 1977); Evans v. Suntreat Growers & Shippers, Inc., 531 F.2d 568 (TECA 1976); Manning v. Univ. of Notre Dame Du Lac, 484 F.2d 501 (TECA 1973), *supra.* See also DeRieux v. 5 Smiths, Inc., 499 F.2d 1321, *cert. denied,* 419 U.S. 896 (1974). Union contends that *DeRieux* indicates that the potential for treble damages under § 210 renders all actions under that statute penal in nature. However, the issue presented in *DeRieux* concerned the retroactivity of § 210 where the plaintiff was suing for treble damages. The court did not discuss an action for actual damages under § 210.

or forfeiture". County of San Diego v. Milotz, 46 Cal. 2d 761, 300 P.2d 1 (1956); Heesy v. Vaughn, 31 Cal. 2d 701, 192 P.2d 753 (1948); Miller v. Municipal Court, 22 Cal.2d 818, 142 P.2d 297 (1943); see also Leh v. General Petroleum Corp., 330 F.2d 288 (9th Cir. 1964), *rev'd on other grounds,* 382 U.S. 54 (1965). Clearly a claim for treble damages in reliance upon § 210 is within this definition.

However, to apply the one year statute to an action for actual damages would be inconsistent with the express terms of § 210 and its underlying policy. An action for compensation logically is not "[a]n action upon a statute for a penalty or forfeiture." In the past TECA has noted the complexity of the price regulations and the difficulty of determining compliance therewith. *See Longview, supra,* and *Evans v. Suntreat, supra.* Given this complexity, it would be especially unreasonable to bar gratuitously an action for reimbursement of overcharges on the basis of the one year statute of limitations. The logical, indeed express, applicability of California's three year statute of limitations to the claim for overcharges must be recognized.[17]

III

Our conclusion that a § 210 claim for actual damages is controlled by § 338(1) while a claim for treble damages is barred

17. Union would have us read § 340(1) of the California statute as if it provided that "any action in reliance upon a statute providing liability for a penalty alone or with other types of liability shall be brought within one year." It is much less strained and reasonable to read it as providing that "any action to recover a penalty created by statute shall be brought within one year." We are not impressed with the argument that on some unitary theory a claim not presenting foundations for recovery of a penalty and not seeking any penalty must be deemed nonetheless an action for a penalty, and that notwithstanding the separation of essentially different claims in a complaint as provided by Rule 8(e)(2), F.R.C.P., the failure of one by reason of a statute of limitations necessarily entails the failure of both. Nor do we find convincing the idea that the use of the term "action" in the California statute precludes separate consideration of each of Ashland's claims as actions. Neither would be any less or more a separate action if standing alone in a complaint.

in accordance with § 340(1) is not inconsistent with California law. In United States v. Magnolia Motor & Logging Co., 208 F. Supp. 63 (N.D. Cal. 1962), it was held that Cal.C.C.P. Section 340(1) barred the United States' action for treble damages, but not for actual damages. In Stock v. Meek, 35 Cal.2d 809, 221 P.2d 15 (1950), and Porter v. Arthur Murray, Inc., 249 Cal. App. 2d 410, 57 Cal. Rptr. 554 (1967), actions for treble damages were dismissed; however, the plaintiff was allowed to recover for "money had and received". *See also,* Beck v. Arthur Murray, Inc., 245 Cal. App. 2d 976, 54 Cal. Rptr. 328 (1966). (The court indicates that the plaintiff might recover actual damages even though a claim for treble damages may ultimately be denied.)

Union attempts to distinguish these cases on the ground that in them the right to single damages existed at common law, whereas Ashland's action for actual damages is dependent on § 210. We need not pursue the possibility that the recovery of overcharges could be deemed as a pendant claim in the nature of a common law count for money had and received to avoid such distinction. In Stone v. James, 142 Cal. App. 2d 738, 299 P.2d 305 (1956), the court indicated that a statutory right to recover prepaid finance charges was governed by a two year statute of limitations, although an action under the statute for the entire purchase price was in the nature of a penalty and therefore governed by § 340(1).[18] This case in the absence of a ruling by

18. The plaintiff in *Stone* sued under California's Civil Code § 2982, subdivisions (d) and (e). Subdivision (d) of that statute provided that a buyer of a motor vehicle under a conditional sales contract could pay off the entire debt at any time prior to its maturity. In that event the buyer would be entitled to receive a refund credit for any prepaid finance charges less certain adjustments required by the statute. If the seller failed to refund any prepaid finance charges subdivision (e) provided that the buyer could recover the total amount paid under the contract. The court held that subdivisions (d) and (e) of Section 2982 were severable. Subdivision (e) was held to provide for a penalty, barred by § 340(1). The court did not question that an action to recover prepaid finance charges under subdivsion (d) would be governed by the longer period of two

the California Supreme Court to the contrary is at least persuasive of California law. Cf. West v. American Tel. & Tel. Co., 311 U.S. 223 (1940), and Six Companies of California v. Joint Highway District No. 13, 311 U.S. 179 (1940).

Ashland argues on the basis of Holland v. Nelson, 5 Cal. App. 3d 308, 85 Cal. Rptr. 117 (1970), that California's three year statute of limitations should be applied to its claim for treble damages as well as to that for compensation. In *Holland,* it was held that the one year limitation for a statutory penalty or forfeiture applied neither to the plaintiff's claim for actual damages nor to that for treble damages. The court reasoned that the option of awarding exemplary damages did not convert the statutory right of action for either single or treble damages into one for a penalty.[19]

The *Holland* case is contrary to the weight of California authority concluding that statutes permitting recovery in excess of actual damages are penal in nature.[20] Thus, although the

years. However, since the complaint was filed more than two years after the sales transaction at issue occurred, a demurrer to the entire action was sustained.

19. The *Holland* court stated:

> [T]he provision in Civil Code, Section 1812.62, allowing to the court the option of granting judgment for treble damages, is not to be construed as converting the statutory right of action into one for penal damages. To adopt the contrary construction would either apply a shorter period of limitation than that established by Code of Civil Procedure section 338, subdivision (1), for actions on other statutory liabilities or would put a plaintiff in the position of being unable to determine which statute of limitations applies to his cause until, after trial, the court determined in its discretion whether to allow treble damages.

85 Cal. Rptr. at 119.

20. For example, the California Welfare and Institutions Code § 2223 provides for a discretionary award of double damages. In Dept. of Social Welfare v. Stauffer, 56 Cal. App. 2d 699, 133 P.2d 692 (1943), California's one year statute of limitation was held to apply to an action under § 2223 for double damages. *See also,* Dept. of Social Welfare v. Wingo, 77 Cal. App. 2d 316, 175 P.2d 262 (1946). California's Usury Act of 1919 provided for a discretionary award of treble the usurious interest. This provision has been held to be a statutory penalty. Penziner v. West

Holland court was correct in concluding that a claim for actual damages is not one for a penalty, we decline to accept the distinction it would draw between a mandatory and permissive award of treble damages with reference to the applicable limitation period.[21] The preponderance of California law establishes that an award in excess of compensatory damages, whether discretionary or not, is to be considered a penalty for the purposes of its limitations statute.

IV

We conclude in sum that the district court erred in dismissing Ashland's claim for actual damages. Such a separate claim for actual loss is not "[a]n *action* upon a penalty or forfeiture." Cal.C.C.P. § 340(1). To hold otherwise would be at variance with the express provisions of § 210, creating alternative rights of action against violators of price regulations dependent upon a different combination of elements, and through an illogical shortening of the period of limitations with respect to non-penalty claims would unjustifiably frustrate congressional policy underlying § 210 for the encouragement of private surveillance of price regulations. The district court was correct in dismissing Ashland's claim for treble damages which as distinguished from the first claim clearly was for a penalty.

Affirmed in part, reversed in part, and remanded for further proceedings in harmony with this opinion.

IT IS SO ORDERED.

American Finance Co., 10 Cal. 2d 160, 72 P.2d 252 (1937); Esposti v. River Brothers, Inc., 207 Cal. 570, 279 P. 423 (1929). Other cases where the discretionary award of treble damages was termed penal in nature include Gwinn v. Goldman, 57 Cal. App. 2d 393, 134 P.2d 915 (1943), and Swall v. Anderson, 60 Cal. App. 2d 825, 141 P.2d 912 (1943).

21. Ashland's ambivalence between claimed severability of its action to realize its compensatory claim and asserted inseparability of the statutory limitation to rescue its discretionary treble damage count has not dispelled our support of the former position nor served to enlist our acceptance of the latter.

Appendix B

Temporary Emergency Court of Appeals of the United States

No. 9-38

Ashland Oil Company of California,
Plaintiff-Appellant,
v.
Union Oil Company of California,
and
Department of Energy,
Defendants-Appellees.

Before Honorable James M. Carter, Honorable A. Sherman Christensen, and Honorable William J. Jameson, Judges.

This cause came on to be heard on the record on appeal from the United States District Court for the Northern District of California and was argued by counsel.

Upon consideration whereof,

IT IS ORDERED that the judgment of said court is affirmed in part, reversed in part, and remanded for further proceedings in harmony with the opinion.

FOR THE COURT:

/s/ RUTH H. JACOBSON
Ruth H. Jacobson
Clerk

December 12, 1977
District Court No. 77-0607 CBR

Appendix C

Excerpts From Reporter's Transcript of the Proceedings of June 23, 1977 in The District Court

"THE COURT [addressing Ashland's counsel] * * * Let me ask you this: What about—you distinguish between—don't you divide your cause of action seeking single damages and treble damages? Don't you have just one claim for overcharge, and then if there is an overcharge, then you have, under the statute, the alternative of either getting your single value of the overcharge, or the courts may treble it? Isn't that all you have?

"Mr. Toombs [counsel for Ashland]: We have pleaded two causes of action, your Honor. The first cause of action seeks—

"THE COURT: I know you plead two causes of action. That's why I asked the question. But don't you know you only have one cause of action, and that's for the overcharge, and that, depending on the circumstances, you may either get the single value of the overcharge or you get a treble?

* * *

"THE COURT: We're not talking about a California state claim, are we really? We're talking about a federal statute claim.

"Mr. Toombs: Yes.

"THE COURT: There's no basic claim for overcharge, other than the basis for—

"Mr. Toombs: But we're—

"THE COURT: —statute, don't you think?

* * *

"THE COURT: You see, the thing is, I really don't believe that—that it was contemplated, or that a court would hold that you have one year within which to file after the claim arises, if you're seeking trebling, and you have three or four or five or some other period to file, if you're only seeking single damages. I just don't think so. I think you've got one claim here, and that one claim, depending upon the circumstances, may entitle you to the trebling of the amount of the overcharge."

Appendix D

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Original Filed March 23, 1977
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San Francisco

United States District Court
Northern District of California

Civil Action No. C77 0607 CBR

Ashland Oil Company of California
1436 Fourteenth Avenue, Oakland, California 94606,
Plaintiff,

v.

Union Oil Company of California,
Union Oil Center, Los Angeles, California 90017,
and
Federal Energy Administration,
Federal Building, 12th & Pennsylvania Ave., N.W.,
Washington, D. C. 20461,
Defendants.

COMPLAINT AND DEMAND FOR JURY TRIAL

(Violation of Mandatory Petroleum
Price Regulations, 10 C.F.R. Part 212)

The above-named plaintiff files this Complaint against the above-named defendants and, demanding trial by jury, alleges as follows:

I. *Introduction*

1. This is an action to recover price overcharges, treble damages and attorneys' fees resulting from sales of motor gasoline by defendant, Union Oil Company of California ("Union"), to plaintiff, Ashland Oil Company of California ("Ashland"), at prices in excess of those permitted by the Regulations (see definition, ¶ 4(a), *infra*).

II. *Jurisdiction and Venue*

2. The jurisdiction of this Court is based upon Sections 210 and 211(a) of the Economic Stabilization Act (see definition, ¶ 4(a), *infra*); upon Section 5(a)(1) of the Emergency Petroleum Allocation Act (see definition, ¶ 4(b), *infra*); and upon 28 U.S.C. § 1331(a).

3. Venue is based upon 28 U.S.C. §§ 1391(b), (c) and (e), in that the claim and cause of action arose in part in this district and the corporate defendant is doing business in this district.

III. *Definitions*

4. As used in this Complaint:

(a) The "Economic Stabilization Act" and the "ESA" mean the Economic Stabilization Act of 1970, 84 Stat. 799, as amended and reenacted by the Economic Stabilization Act Amendments of 1971, 85 Stat. 743, as further amended, as in effect on November 27, 1973 and as so incorporated by reference into Section 5(a)(1) of the Emergency Petroleum Allocation Act. *See* 12 U.S.C.A. § 1904, note (1976 Pocket Part).

(b) The "Emergency Petroleum Allocation Act" and the "EPAA" mean the Emergency Petroleum Allocation Act of 1973, as amended, 15 U.S.C. § 751, *et seq.*

(c) The "Regulations" mean the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R., Parts 211 and 212, promulgated on January 15, 1974, pursuant to the Emergency Petroleum Allocation Act.

(d) "Class of purchaser" means purchasers of motor gasoline to whom a refiner has charged a comparable price for comparable property or service pursuant to customary price differentials between those purchasers and other purchasers. *See* 10 C.F.R. § 212.31 and predecessor provisions.

(e) "Maximum allowable price" and "base price" mean, with respect to sales of motor gasoline by a refiner, the weighted average price at which such product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, plus increased product costs incurred between the month of measurement and May 1973, and measured pursuant to the Regulations. *See* 10 C.F.R. § 212.82 and predecessor provisions.

(f) "Nonbranded independent marketer" means a firm which is engaged in the marketing or distributing of motor gasoline, but which is not a refiner and is not a firm which controls, is controlled by, is under common control with, or is affiliated with a refiner, and is not a branded independent marketer. *See* 15 U.S.C. § 752(2) and 10 C.F.R. § 211.51.

(g) "Refiner" means a firm which refines motor gasoline and sells it to others. *See* 10 C.F.R. § 212.31.

(h) "Wholesale purchase-reseller" means a firm which purchases, receives or otherwise obtains motor gasoline and resells it or otherwise transfers it to other purchasers without substantially changing its form. *See* 10 C.F.R. § 211.51.

(i) "Willfully" means that term as employed in Sections 208(a) and 210(b) of the ESA.

IV *Parties*

5. Plaintiff Ashland is a nonbranded independent marketer and wholesale purchaser-reseller of motor gasoline and other petroleum products. Ashland is incorporated under the laws of the State of California and maintains its principal place of business in Oakland, California.

6. Defendant Union is a major integrated oil company and a refiner of motor gasoline and other petroleum products. Union is incorporated under the laws of the State of California.

7. Defendant Federal Energy Administration ("FEA") is an agency of the United States, established and existing under the provisions of the Federal Energy Administration Act, 15 U.S.C. § 761, *et seq.*, and Executive Order No. 11790 (39 Fed. Reg. 23,185, June 27, 1974), both set forth at 15 U.S.C.A. § 761, note, and both of which became effective on June 27, 1974. FEA has the primary responsibility for administering and enforcing the mandatory petroleum pricing and allocation provisions of the EPAA. Prior to June 27, 1974, the duties now delegated to and performed by FEA were performed by the Federal Energy Office under a delegation of authority contained in Executive Order No. 11748 (38 Fed. Reg. 33,575, December 4, 1973). FEA is named as a defendant herein because it may be held to be a necessary party hereto.

V. *Facts*

8. On or about December 6, 1974, and on various dates thereafter, FEA, acting pursuant to the Regulations, issued orders to Union assigning and directing it to supply motor gasoline to Ashland.

9. In accordance with such FEA assignment orders, beginning in January 1975, and continuing until approximtaely February 1976, Ashland purchased from Union approximately 6,370,984 gallons of motor gasoline.

10. During the period relevant to this Complaint, the Regulations provided in substance that a refiner may not charge to any class of purchaser a price in excess of the base price or the maximum allowable price. *See* 10 C.F.R. §§ 212.82, 212.83 and predecessor provisions.

11. Pursuant to the Regulations, Ashland fell within the class of purchaser composed of nonbranded independent marketers who are independent wholesale purchaser-resellers.

VI. *First Cause of Action*

12. During the period relevant to this Complaint, the prices charged by Union to Ashland for motor gasoline sold to it have exceeded the prices charged to other members of the same class of purchaser by not less than 5.5 cents per gallon.

13. As a result of the foregoing, Union has sold motor gasoline to Ashland at prices in excess of those permitted by the Regulations and by the ESA and the EPAA.

14. On or about August 16, 1976, Ashland filed a claim for a refund with Union in the amount of $350,000 for overcharges discovered and accrued up to that date.

15. Pursuant to Section 210(b) of the ESA, as incorporated by reference into Section 5(a)(1) of the EPAA, Ashland is entitled to recover from Union the amount of such overcharges, plus its reasonable attorneys' fees and costs.

VII. *Second Cause of Action*

16. Paragraphs 1 through 13 hereof are repeated and realleged with the same force and effect as if set forth in full herein.

17. During the period relevant to this Complaint, Union has willfully overcharged Ashland for motor gasoline purchased by it.

18. Such overcharges by Union were intentional, and were not the result of a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error.

19. Pursuant to Section 210(b) of the ESA, as incorporated by reference into Section 5(a)(1) of the EPAA, Ashland may be awarded damages against Union in an amount not more than three times the amount of such overcharges, plus its reasonable attorneys' fees and costs.

IX. *Relief*

WHEREFORE, plaintiff prays that it be awarded the following relief against Union:

1. Upon the First Cause of Action, the amount which it has been overcharged.

2. Upon the Second Cause of Action, an amount equal to three times the amount of the overcharges.

3. Interest at the legal rate on each of the foregoing causes of action.

4. Its reasonable attorneys' fees and costs.

5. Such other and further relief as may be just and proper.

Respectfully submitted,

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DEMAND FOR TRIAL BY JURY

Plaintiff hereby demands trial by jury.

/s/ WILLIAM H. BODE
William H. Bode